Supreme Court, U.S.
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No. 87-624

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CONSOLIDATED FRFIGHTWAYS CORPORATION OF DELAWARE

Petitioner

v.

SECRETARY OF TRANSPORTATION, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the inadvertent misdirection of a notice of appeal, which would otherwise have been timely filed, is "excusable neglect" within the meaning of Fed. R. App. Proc. 4(a)(5)?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 6

CONCLUSION..... 13

TABLE OF AUTHORITIES

CASE	PAGE(s)
Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174 (1st Cir. 1978).....	9,11
Marshall v. Hope Garcia Lancarte 632 F.2d 1196 (5th Cir. 1980).....	10
Marshall v. Truland Corp., 24 F.R. Serv.2d 1443 (4th Cir. 1978).....	10
Myers v. Stephenson, 781 F.2d 1036 (4th Cir. 1986).....	10
State of Oregon v. Champion International Corp., 680 F.2d 1300 (9th Cir. 1982).....	9,11
STATUTE	
Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301 et seq.....	1
RULES OF COURT	
Supreme Court Rule 17.1(a),(c)...	6

STATEMENT OF THE CASE

1. The underlying dispute in this case is whether certain provisions of Pennsylvania law affecting trucks are inconsistent with and preempted by the federal Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301 et seq. The District Court held that they were, and granted declaratory and injunctive relief to petitioner. The District Court's order was entered on November 19, 1986. Pet. App. 2a-3a, 15a.

The case had been tried in Harrisburg, in the United States District Court for the Middle District of Pennsylvania, and the respondent state officials were represented by the Pennsylvania Office of Attorney General, headquartered in Harrisburg. It is the practice of the Office of Attorney General, toward the end of each business

day, to hand-carry that day's filings to the office maintained in Harrisburg by the Clerk of the Middle District. Pet. App. 3a, n.1.

On December 18, 1986--one day before the deadline for appealing the District Court's order--respondents' counsel prepared a notice of appeal and related documents. Pet. App. 3a. The notice of appeal was on a standard form. Pet. App. 15a. It correctly identified the name of the case, its docket number, and the district judge involved, and was accompanied by a check to cover the filing fees. Pet. App. 3a, 15a. The notice, however, inadvertently placed the case in the Eastern rather than the Middle District of Pennsylvania. Ibid.

As a result, the appeal papers, instead of being carried to the clerk's office, where they would have been filed one day early, were erroneously mailed to Philadelphia. The Clerk of the Eastern District forwarded them to the Middle District, where they were filed five days late, on December 24, 1986. Ibid.

Respondents' counsel, however, remained unaware of this problem until January 14, 1987, when he received a letter from the Court of Appeals advising him of the jurisdictional defect. Pet. App. 4a, 16a. That same day, he filed a motion in the District Court, under Fed. R. App. Proc. 4(a)(5), asking for a five-day extension of the appeal period, so that the notice of appeal would be deemed timely filed. Pet. App. 4a, 16a. Petitioner opposed the motion. Ibid.

2. The District Court denied the motion, holding that a mistake made by counsel or someone under counsel's control could never constitute "excusable neglect" within the meaning of Rule 4(a(5). Pet. App. 19a. The District Court also expressed its concern that, "if the conduct in this case is held to be excusable, we are hard pressed to discern a principle that would delineate excusable neglect from inexcusable neglect, and the purposes of finality served by Federal Rule Appellate Procedure 4(a) would be circumvented." Ibid.

3. The Court of Appeals disagreed. It rejected the District Court's "per se rule against applying excusable neglect to inadvertence of counsel," Pet. App. 7a, in favor of a case by case analysis focusing on the distinction between "inadvertence which

occurs despite counsel's efforts to comply and inadvertence which results from counsel's lack of diligence." Pet. App. 8a. Applying this standard to the undisputed facts of this case, the Court of Appeals held that the respondents had made the required showing of "excusable neglect." It reversed the District Court and remanded for the entry of an appropriate order. Pet. App. 13a.

ARGUMENT

The petitioner claims that this case presents an important question of federal court jurisdiction to which the Courts of Appeals have given varying answers, and that this situation requires the Court to exercise its power of discretionary review. See Supreme Court Rule 17.1(a),(c). To the contrary, the procedural point at issue is of no importance to anyone except the litigants in this case. It has received virtually no attention from the lower courts, no doubt because it hardly ever arises, and it should be left to them for further consideration if and when it arises again.

1. Petitioner at first concedes that "[t]his case does not involve a momentous public issue," Pet. at 6, but then argues that it does, after all, present an "important" question of "federal jurisdiction" which should be resolved by the Court, Pet. at 10. Petitioner was right the first time. All the rhetorical skills in the world cannot obscure the fact that this case is about the grant or denial of a five-day extension of time. As Speaker of the House Thomas B. Reed once said in another context, "The overpowering unimportance of this makes me speechless." B. Tuchman, The Proud Tower 122 (1966).

Moreover, the petitioner's remarks about "federal jurisdiction" and "conflicts between governments in our federal system," Pet. at 10, are inaccurate. While it is true that the issue

in this case is "jurisdictional" in the sense that the extension of time must be granted for the Court of Appeals to have jurisdiction over the appeal on the merits, this is a point not of federal jurisdiction, but of appellate jurisdiction. The respondents' motion for a five-day extension of time raises no conceivable issue regarding the proper limits on federal, as opposed to state, jurisdiction, nor does it have any conceivable ramifications for the resolution of conflicts between the state and federal governments. Rather, this is a simple procedural matter that may well be allowed to rest where it lies.

2. Petitioner relies heavily on what it describes as a conflict among the Circuits. Pet. at 6-9. According to the petitioner, the issue of whether

to grant an extension of time under Rule 4(a)(5) has arisen on an "embarrassingly large" number of occasions, Pet. at 6, n., and the Courts of Appeals have adopted well-settled but diverse standards for resolving it.

Petitioner exaggerates. There is in fact no disagreement among the Circuits on the general standard to be applied to Rule 4(a)(5) motions. As the Third Circuit recognized in this case, "the standard for determining excusable neglect is a strict one, and...excusable neglect applies only to extraordinary cases where injustice would otherwise result." Pet. App. 5a, quotation marks omitted. Accord, e.g., State of Oregon v. Champion International Corp., 680 F.2d 1300, 1301 (9th Cir. 1982) (per curiam); Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174, 1175 (1st Cir. 1978)(per curiam).

The real issue in this case is the far more narrow and circumstantial question of whether "excusable neglect" exists when an inadvertent clerical error thwarts what would otherwise have been a timely filed appeal. Consideration of this issue in the lower courts has been, contrary to petitioner's suggestion, neither frequent nor thorough. The combined efforts of the parties and the courts below found only four cases where this issue had arisen; in each of them the court disposed of the matter perfunctorily, with little or no analysis. See Myers v. Stephenson, 781 F.2d 1036 (4th Cir. 1986)(notice of appeal sent to wrong court); State of Oregon v. Champion International Corp., supra (same); Marshall v. Hope Garcia Lancarte, 632 F.2d 1196 (5th Cir. 1980)(wrong docket number); Marshall v. Truland Corp., 24 F.R. Serv. 2d 1443 (4th Cir. 1978)

(per curiam)(notice of appeal misdirected within Justice Department).

The mere fact that in one of these cases--State of Oregon--the Ninth Circuit reached a result different from that which the Third Circuit reached in this case does not necessitate review by the Court. It is by no means clear that the Third and Ninth Circuits are irreconcilably at odds on this issue.[1] The Ninth Circuit's opinion in State of Oregon is a per curiam decision by a divided panel, and the two judges of the

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[1]The petitioner's claim that the Third Circuit is also at odds with the First Circuit, Pet. 7, needs little discussion. In Airline Pilots v. Executive Airlines, Inc., supra, the First Circuit rejected a claim of "excusable neglect" premised on the alleged miscalendaring of the appeal's due date. The Third Circuit distinguished Airline Pilots on its facts, Pet. App. 8a, but intimated no disagreement with its holding.

majority gave only the most perfunctory explanation of their reasoning. Moreover, they did not have the benefit of the Third Circuit's decision in this case, which is to date the only thorough analysis of the issue by any court. It would therefore be premature for the Court to step in to settle a "conflict" which further developments may show was illusory.

Because of the inherently freakish circumstances which give rise to the issue presented in this case, it is likely to arise as infrequently in the future as it has in the past. To the extent that it arises at all, it will benefit from further seasoning in the lower courts.

CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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